

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT PIKEVILLE**

CIVIL ACTION NO. _____

UNITED STATES OF AMERICA

PLAINTIFF

v.

APEX ENERGY, INC., CAMBRIAN COAL
CORPORATION and MARSHALL RESOURCES, INC.

DEFENDANTS

CONSENT DECREE

WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed the Complaint in this action against Defendants Apex Energy, Inc., Cambrian Coal Corporation, and Marshall Resources, Inc. (collectively, “Defendants”), alleging that Defendants violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at three separate locations within a surface coal mining operation site near Jamboree in Pike County, Kentucky (the “Sites”), more fully described in the Complaint and identified on Exhibit A hereto, without authorization by the United States Department of the Army (the “Corps”);

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require

Defendants, at their expense and under the direction of EPA, to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Sites;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Eastern District of Kentucky pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Defendants conduct business in this judicial district, the subject property is located in this judicial district, and the causes of action alleged herein arose in this judicial district.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon each Defendant. In any action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm, association or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions of this Consent Decree.

5. The transfer of ownership or other interest in the Sites shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least 15 days prior to the transfer of ownership or other interest in the Sites, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify EPA and the United States Department of Justice (“DOJ”) at the addresses specified in Section VI below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against Defendants under CWA Sections 301 and 404 concerning the Sites.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent

Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Defendants' obligations under this Consent Decree are joint and several.

9. The parties acknowledge that Nationwide Permit 32, 72 Fed. Reg. 11,092 (Mar. 12, 2007), authorizes any fill that was placed as of March 2003 at the Sites to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. Respondents will need to obtain an individual 401 Water Quality Certification from the Kentucky Division of Water.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

11. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS

15. Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

16. Defendants shall pay a civil penalty to the United States in the amount of One Hundred Seventy Thousand Dollars (\$170,000.00) within 30 days of entry of this Consent Decree. Defendants shall make this payment by FedWire Electronic Funds Transfer ("EFT") to DOJ in accordance with current EFT procedures, referencing the U.S.A.O. file number, EPA Region IV, and the DOJ case number (90-5-1-1-17714). Payment shall be made in accordance with instructions provided to Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Kentucky. Any payments received by DOJ after 4:00 p.m. Eastern Time will be credited on the next business day.

17. Defendants also shall make a payment to the Kentucky Department of Fish and Wildlife Resources' ("KDFWR") Stream and Wetland Restoration Program in the amount of One Hundred and Fifteen Thousand Dollars (\$115,000.00), within 30 days of entry of this Consent Decree. It is intended that KDFWR will deposit this payment in Kentucky's Stream and Wetland Mitigation Trust Fund to be used to conserve and restore streams and wetlands in the Commonwealth of Kentucky.

18. The civil penalty paid pursuant to Paragraph 16 of this Consent Decree is a penalty within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and is not tax deductible expenditures for purposes of federal law.

19. Upon making the payments required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section VI of this Consent Decree that such payments were made in accordance with Paragraphs 16 and 17.

20. In the event that Defendants fail to make timely payment, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest also shall be compounded annually.

V. DISPUTE RESOLUTION

21. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and the Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond 30 days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 14 days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have 30 days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

22. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the 30-day period for informal negotiations. The Defendants shall have 14 days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

23. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree.

VI. ADDRESSES

24. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Carol Baschon
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
- (2) Mike Wylie
Stephanie Fulton
Wetlands Regulatory Section
U.S. Environmental Protection Agency, Region IV
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Chief, Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

C. TO DEFENDANTS:

- (1) Laura D. Keller
Stites & Harbison PLLC
250 West Main Street
2300 Lexington Financial Center
Lexington, Kentucky 40507-1758
- (2) Rebecca S. Gohmann
General Counsel
Matrix Energy, LLC and Affiliates
107 Dennis Drive
Lexington, KY 40503
- (3) Mark Campbell
Vice President and Secretary
Apex Energy, Inc.
P.O. Box 2100
Pikeville, KY 41502

VII. COSTS OF SUIT

25. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

VIII. PUBLIC COMMENT

26. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R.

§ 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Consent Decree.

IX. CONTINUING JURISDICTION OF THE COURT

27. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

X. MODIFICATION

28. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

XI. TERMINATION

29. Except for Paragraphs 9 and 15, which shall survive termination of this Consent Decree, this Consent Decree may be terminated upon receipt of all payments required in Part IV.

IT IS SO ORDERED.


Dated and entered this _____ day of _____, 20____.

UNITED STATES DISTRICT JUDGE

We hereby consent to the entry of this Consent Decree in United States of America v. Apex Energy, Inc. (E.D. Ky.), subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR PLAINTIFF UNITED STATES OF AMERICA:

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division



Paul Cirino, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Telephone: (202) 514-1542
Facsimile: (202) 514-8865
paul.cirino@usdoj.gov

Dated: November 12, 2008

We hereby consent to the entry of this Consent Decree in United States of America v. Apex Energy, Inc. (E.D. Ky.), subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR PLAINTIFF UNITED STATES OF AMERICA (Continued):

JAMES A. ZERHUSEN
United States Attorney
Eastern District of Kentucky



ANDREW L. SPARKS
Assistant United States Attorney
Eastern District of Kentucky
260 West Vine Street
Lexington, Kentucky 40507
Telephone: (859) 233-2661
Facsimile: (859) 233-2666
andrew.sparks@usdoj.gov

Dated: 8.5.08

We hereby consent to the entry of this Consent Decree in United States of America v. Apex Energy, Inc., (E.D. Ky.), subject to the public notice and comment provisions of 28 U.S.C. § 50.7:

FOR PLAINTIFF UNITED STATES OF AMERICA (Continued):



RANDOLPH L. HILL

Acting Director

Office of Enforcement & Compliance Assurance

Office of Civil Enforcement

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W.

Washington, DC 20460

Dated: 11/10/08

OF COUNSEL:

JAMES VINCH

Office of Civil Enforcement

Water Enforcement Division

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W.

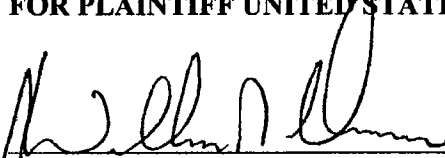
Washington, DC 20460

Telephone: (202) 564-1256

Facsimile: (202) 564-0024

We hereby consent to the entry of this Consent Decree in United States of America v. Apex Energy, Inc. (E.D. Ky.), subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR PLAINTIFF UNITED STATES OF AMERICA (Continued):



Dated: 11/3/28

MARY J. WILKES
Regional Counsel
United States Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303

Of Counsel:
CAROL F. BASCHON
Assistant Regional Counsel
Office of Water Legal Support
United States Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303
Telephone: (404) 562-9528
Facsimile: (404) 562-9486

We hereby consent to the entry of this Consent Decree in United States of America v. Apex Energy, Inc. (E.D. Ky.), subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

**FOR DEFENDANTS APEX ENERGY, INC., CAMBRIAN COAL CORPORATION,
AND MARSHALL RESOURCES, INC.**



MARK CAMPBELL

Vice President and Secretary
Apex Energy, Inc.
P.O. Box 2100
Pikeville, KY 41502

Dated: AUGUST 7, 2008

